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Morgan v. Demos Appellant's Reply Brief Dckt. 40170

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARVIN F. MORGAN,)	
Plaintiff/Appellant,)	Case No. CV-2006-4332
)	
vs.)	Docket No. 40170-2012
)	
MICHAEL ALEXANDER DEMOS, M.D.,)	
JOHN D. CHAMBERS, JR., M.D.; and)	
IDAHO HEART INSTITUTE, P.C.)	
Defendants/Respondents.)	

REPLY BRIEF OF PLAINTIFF/APPELLANT
MARVIN F. MORGAN

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho in and for the County of Bonneville

HONORABLE JON J. SHINDURLING, District Judge

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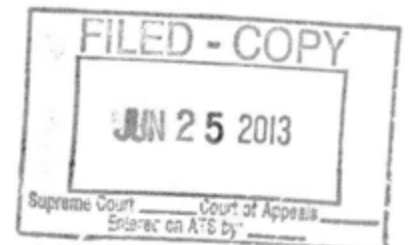


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STATEMENT OF THE CASE ON REPLY

There appears to be no dispute over the nature of the case or the course of the relevant proceedings below. The Defendants/Respondents have not referenced the statement of the facts set forth in Appellant's opening brief, so it is assumed that the Defendants/Respondents do not take exception with those assertions. On that basis, Appellant, in his reply, will limit his response to the facts and arguments set out in Respondents' Brief.

Again, it is emphasized that there were *no findings of fact or conclusions of law filed by the District Court relevant to any of the issues on appeal.*

ISSUES ON APPEAL

The Defendants/Respondents have identified and addressed the following issues to be considered on appeal, to which the Appellant (hereinafter "Mr. Morgan") will reply in the order outlined in his opening brief:

- A. Did the District Court err in granting sanctions?
- B. Did the District Court err in excluding Mr. Morgan's expert witness pursuant to Rule 37(b)?
- C. Did the District Court err in dismissing Mr. Morgan's case pursuant to Rule 40(c)?
- D. Are Respondents entitled to attorneys fees on appeal?

ARGUMENT ON REPLY

A. Error in awarding sanctions pursuant to Rule 37(a)(4)

In addressing this issue, the Defendants/Respondents suggest that the District Court properly exercised its discretion in awarding sanctions and reference the standard of review on discretionary decisions, citing *Sun Valley Shopping Ctr, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). The problem with the Defendants'/Respondents' analysis is that the District Court did *not* perceive the award of sanctions as discretionary, but rather as mandatory under IRCP Rule 37(a)(4). *R. Vol. III, p. 437, T. p. 14, ll. 1-12*. Rule 37(a)(4) only applies in allowing a party to recover the costs of *obtaining an order to compel discovery*. The Defendants/Respondents never filed a motion to compel discovery; therefore, Rule 37(a)(4) is clearly not an appropriate basis for the award of sanctions in this case. In addition, there was no finding of fact supporting the basis for Dr. Selzman's costs and no finding of fact was made that the remaining costs were "extraordinary", which was the standard the District Court itself indicated would apply. *R. Vol. III, p. 436, T. p. 11, ll. 11-21*.

B. Error in excluding Mr. Morgan's expert witness pursuant to Rule 37(b)

Both the Appellant and the Defendants/Respondents identified and agree with the general standard of review that applies to discretionary decisions, including those under IRCP Rule 37(b). However, the Defendants/Respondents ignore the fact that when this Court denied Mr. Morgan's motion for permission to appeal, the *Order Denying Motion for Permission to Appeal*

dated May 13, 2010, remanded the case for further consideration by the District Court with the directive to the District Court that “. . . the district court possesses authority to exercise its discretion and *should reconsider the order* excluding Dr. Schapira and to evaluate the fact that prejudice does not likely occur to defendants resulting from plaintiff's previous non-compliance with the court's order regarding discovery.” (*Emphasis added.*) The District Court considered that a “recommendation” not a “directive” and elected not to reconsider its order excluding Dr. Schapira. *R. Vol. IV, p. 726.* That failure constitutes an abuse of discretion.

C. Error in Dismissing Mr. Morgan's Case Pursuant to Rule 40(c)

The Respondents' base their entire argument on the District Court's dismissal of Mr. Morgan's case pursuant to IRCP Rule 40(c) on the basis that there was *no abuse of discretion*, citing *Kirkham v. 4.60 Acres of Land*, 100 Idaho 781, 784, 605 P.2d 959 (1980) and *Agrodyne, Inc. v. Beard*, 114 Idaho 342, 345, 757 P.2d 205 (Ct. App. 1988). Respondents also note that *if* this was a discretionary decision, then when reviewed on appeal the appellate court conducts a multi-tiered inquiry to determine (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with legal standards applicable to specific choices before it; and (3) whether the court reached its decision by an exercise of reason, citing *Sun Valley Shopping Ctr, Inc. v. Idaho Power Co., supra* at p. 94.

First, it is emphasized that the District Court did *not* treat the dismissal under Rule 40(c) as one of discretion i.e. on May 24, 2012, the District Court entered its *Opinion and Order on APPELLANT'S REPLY BRIEF* - Page 3 of 6

Plaintiff's Motion to Reopen Case, denying that motion and granting the motion of Defendants Chambers and Demos motion to dismiss pursuant to Rule 40(c) stating “. . . this Court **must** dismiss this case if ‘no action has been taken. . . for a period of six (6) months.’” (**emphasis** in original) *R. Vol. IV p. 726*. The initial inquiry has not been met.

Second, the District Court failed to recognize that even though it ordered a dismissal “without prejudice”, the effect of dismissal in this case was “with prejudice” based on application of the statute of limitations that precludes Mr. Morgan from refileing an action for negligence against these Defendants. As this Court stated in *State Insurance Fund v. Jarolimek*, 139 Idaho 137, 139, 75 P.3d 191 (2003), given the fact that the effect of dismissal was with prejudice, the District Court should have considered whether there were any “aggravating factors” that justified dismissal, which it did not do and there were no such aggravating factors in this case. Even if the District Court had perceived the decision as discretionary, the decision does not satisfy the second tier of inquiry where the District Court failed to apply the applicable legal standards for a dismissal that is in effect “with prejudice.”

Third, the District Court failed to properly follow the preliminary requirements under Rule 40(c) i.e. this Rule only applies to the dismissal of an *active* case where there has been no action taken within six (6) months. In this case, the District Court should have, but did not, reactivate the case and then give proper notice of an intent to dismiss as required under Rule 40(c). The interpretation of the Idaho Rules of Civil Procedure is a matter of law over which this Court has free review. *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998 (2010). The District

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Court and Respondents cite *Herrett v. Herrett*, 105 Idaho 358, 670 P.2d 63 (Ct. App. 1983) as a basis for determining that the statutory notice requirement in Rule 40(c) is not mandatory.

Herrett does not address the notice requirements under Rule 40(c) i.e. it addresses only the statutory time for filing an appeal where the clerk had not given notice of the judgment as required, but the plaintiff in that case had actual notice of the judgment dismissing his complaint.

Finally, the District Court's decision to dismiss in this case should not have been made without reconsidering whether the decision to exclude Mr. Morgan's expert witness was proper in the first place, as was directed on remand.

D. Respondents are not entitled to an award of attorneys fees on appeal

Given the fact that there was no basis for an award of costs under IRCP Rule 37(a)(4), since those costs were not incurred in obtaining a discovery order and, in any event, there was no finding of fact that any of those costs were "extraordinary"; given the fact that there was the initial error by the District Court in excluding Mr. Morgan's expert witness and the District Court failed or refused to even reconsider that decision on remand as directed; given the fact that the District Court did not comply with the express requirements under IRCP Rule 40(c) and, even if Rule 40(c) was properly applied, it was an abuse of discretion in dismissing Mr. Morgan's case where the effect of dismissal was with prejudice, rather than without prejudice, clearly the appeal of the decisions in this case has not been brought "frivolously, unreasonably and without foundation." There is no basis for an award of attorneys fees to the Respondents on appeal.

CONCLUSION ON REPLY

The orders continuing trial and granting sanctions pursuant to IRCP Rule 37(a)(4) based on that motion was improper; the order to exclude Mr. Morgan's expert witness pursuant to IRCP Rule 37(b) was improper; and, the District Court's decision to dismiss Mr. Morgan's causes of action as mandatory based on Rule 40(c) was improper. Mr. Morgan again urges this Court to set aside the order granting sanctions; set aside the District Court's order excluding his expert witness; and, set aside the order dismissing his causes of action and remand this matter with a directive that the District Court immediately place this matter back on the trial calendar.

RESPECTFULLY SUBMITTED this 24 day of June, 2013.

M. BRENT MORGAN, CHTD.


M. BRENT MORGAN
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of June, 2013, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was served on the following named person(s) at the addresses shown and in the manner indicated:

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